No. 01-9094

In the
SUPREME COURT of the UNITED STATES

ABU-ALI ABDUR' RAHMAN,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

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CAPITAL CASE
QUESTIONS PRESENTED

I.

Whether the Sixth Circuit had jurisdiction to review the district court's order transferring petitioner's Rule 60(b) Motion to the Sixth Circuit pursuant to 28 U.S.C. § 1631.

II.

Whether the Supreme Court of the United States has jurisdiction to review the order of the Sixth Circuit denying leave to file a second habeas corpus petition under 28 U.S.C. § 2244(b)(3).

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ARGUMENT

I. THE SIXTH CIRCUIT DID NOT HAVE APPELLATE JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER TRANSFERRING PETITIONER'S MOTION TO THE SIXTH CIRCUIT PURSUANT TO 28 U.S.C. § 1631.

On November 27, 2001, the district court determined that petitioner's Rule 60(b) motion constituted a second or successive application under 28 U.S.C. § 2244(b). Because § 2244(b)(3)(A) requires that, "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application," the district court further concluded that it lacked jurisdiction to entertain the application absent authorization from the court of appeals. Accordingly, the district court transferred the action to the Sixth Circuit under 28 U.S.C. §1631.[1] Petitioner filed with the district court on November 30 a notice of appeal from the district court's

[1] Section 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

transfer order. (R. 268, J.A. 11)(No. 01-6504) On February 11, 2002, the Sixth Circuit dismissed the appeal for want of jurisdiction. Specifically, the court ruled:

> The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in No. 01-6504, which is therefore DISMISSED for lack of jurisdiction[.]

(J.A. 39) (emphasis in original).

Petitioner could not appeal as of right from the transfer order. As a general principle, it is well settled that transfer orders are not appealable final orders under 28 U.S.C. § 1291. *Ukiah Adventist Hospital v. Federal Trade Commission*, 981 F.2d 543, 546 (D.C. Cir. 1993). This settled rule against appealability applies to transfer orders issued pursuant to 28 U.S.C. § 1631. *Id.* (transfer from district court to court of appeals for lack of jurisdiction); *Persyn v. United States*, 935 F.2d 69, 72-73 (5th Cir. 1991) (transfer from district court to claims court); *Alimenta (USA), Inc. v. Lyng*, 872 F.2d 382, 383-85 (11th Cir. 1989) (same); *Raines v. Block*, 798 F.2d 377, 379-80 (10th Cir. 1986) (same); *Middlebrooks v. Smith*, 735 F.2d 431, 432-33 (11th Cir. 1984) (transfer between district courts). "The decisions in *Persyn*, *Alimenta*, *Raines* and *Middlebrooks* reflect the common sense view that section 1631 orders are interlocutory for the same reason that venue transfers are: the very purpose of transfer provisions is to allow the case to continue, rather than terminating it." *Ukiah*, 981 F.2d at 546.

Nor is the order here reviewable as a final judgment under the collateral order doctrine, which requires that the order satisfy at least three conditions: "it must

conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498 (1989) (citing *Richardson-Merrell Inc. v. Koller*, 474 U.S. 424, 431 (1985), quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (internal quotation marks omitted)). First, the collateral order doctrine is wholly inapplicable in this context. Clearly inherent in the doctrine is the notion that there should be an effective appeal from any "final" judgment. But, under § 2244's statutory scheme, Congress has determined that there should be no appeal from the final judgment at all. *See* 28 U.S.C. § 2244(b)(3)(E). Indeed, Congress has vested the court of appeals itself with primary and exclusive jurisdiction over the screening of second or successive petitions. 28 U.S.C. § 2244(b)(3)(A).

Furthermore, even if the collateral order doctrine were applicable, "[t]he courts have almost universally agreed that transfer orders fall outside the scope of the collateral order exception." *F.D.I.C. v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996). Here, the transfer order fails to satisfy even the first requirement, that it "must conclusively determine the disputed question." It did not, because, as this Court noted in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), the transferee court, *i.e.*, the Sixth Circuit, had the power to revisit the decision. For the same reason, the transfer order lacks the third characteristic of an appealable collateral order. The collateral order doctrine is reserved for those situations in which a non-final order could not otherwise

be reviewed effectively. But petitioner could have obtained such review by filing a motion in the Sixth Circuit to retransfer. *See In re Carefirst of Maryland, Inc.*, 305 F.3d 253, 259 (4th Cir. 2002); *McGlamery*, 74 F.3d at 221. He did not do so. A transferee court is not bound by a § 1631 transfer that it determines to be "clearly erroneous," *Christianson*, 486 U.S. at 819; but, "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." *Id.* [2]

In short, petitioner's notice of appeal was ineffective to confer appellate jurisdiction upon the court of appeals to review the correctness of the district court's action treating the Rule 60(b) motion as a second or successive application and transferring the action to that court. Having correctly determined that the order in No. 01-6504 "[was] not an appealable order," the Sixth Circuit was also correct to order it "dismissed for lack of jurisdiction." (J.A. 39) (emphasis omitted).

It follows from what has been said, of course, that the Sixth Circuit did have the power to revisit the propriety of the district court's transfer order, but only in its capacity as the transferee court, *i.e.*, as an exercise of its original jurisdiction under § 2244(b)(3). "[I]t is familiar law that a federal court always has jurisdiction to determine

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[2] The order was not rendered "effectively unreviewable," and thus subject to the collateral order doctrine, because of concerns that concurrent jurisdiction could defeat review. *Cf. Goble v. Marsh*, 684 F.2d 12, 14 (D.C.Cir. 1982). A district court does not have concurrent jurisdiction to screen a second or successive application under 28 U.S.C. § 2244(b)(3). The order was also not appealable under 28 U.S.C. § 1292. The order did not grant or deny an injunction, *see* 28 U.S.C. § 1292(a)(1), nor did petitioner request certification from the district court under § 1292(b).

its own jurisdiction." *United States v. Ruiz*, 122 S.Ct. 2450, 2454 (2002). But petitioner did not properly invoke that review by filing a motion to retransfer the case back to the district court. Moreover, even if he had done so, review of transfer orders is deferential and subject to application of the law-of-the-case doctrine. *See Christianson*, 486 U.S. at 816. While transferee courts are empowered to revisit the transfer decision, "as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" 486 U.S. at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618, n. 8 (1983)). Application of the doctrine in this context is not a limit upon the transferee court's power, but "merely [an expression of] the practice of courts generally to refuse to reopen what has been decided." *Id.*, 486 U.S. at 817. Accordingly, to achieve the end of "quick settlement of questions of transfer," courts engaging in such review should "adhere strictly to principles of law of the case," *id.*, 486 U.S. at 819, and disturb only those transfer orders that are deemed "clearly erroneous." *Id.*

In any event, this case arrived in the court of appeals by transfer from the district court as a motion for leave to file a second or successive application for habeas relief. (J.A. 32) As *Christianson* makes plain, the court of appeals was not required *sua sponte* to second-guess the district court's characterization of the matter by reviewing the propriety of the transfer. Having received the case pursuant to a facially valid transfer order, the court of appeals was fully authorized to dispose of the case on the basis described in the transfer order, namely, as a motion under 28 U.S.C. § 2244(b)(3)(A).

II. THIS COURT DOES NOT HAVE CERTIORARI JURISDICTION TO REVIEW THE SIXTH CIRCUIT'S ORDER DENYING PETITIONER LEAVE TO FILE A SECOND HABEAS CORPUS PETITION.

As demonstrated above, the court of appeals lacked any independent basis of appellate jurisdiction to review the district court's transfer order—under 28 U.S.C. §1291, the collateral order doctrine, or 28 U.S.C. § 1292. It follows, therefore, that the sole basis upon which the case could have proceeded to judgment in the court of appeals was on the terms specified in the district court's transfer order, namely, as a motion for leave to file a second or successive habeas application, over which the courts of appeals enjoy original, exclusive jurisdiction under 28 U.S.C. § 2244(b)(3). The transfer statute, 28 U.S.C. §1631, dictates that a transferred "action . . . proceed as if it had been filed in . . . the court to which it is transferred . . .." Plainly, the case could not have been filed in the Sixth Circuit as a motion for relief from the district court's prior judgment in the original habeas case under Rule 60(b) of the Federal Rules of Civil Procedure. The courts of appeals have no original jurisdiction to dispose of Rule 60(b) motions.

"The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. §2244(b)(3)(E). Accordingly, this Court lacks jurisdiction to review the Sixth Circuit's February 11, 2002, judgment denying petitioner's motion. *Felker v. Turpin*, 518 U.S. 651, 661 (1996)("2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court").

Petitioner may not evade this jurisdictional restriction on the theory that the Sixth Circuit's judgment embodies a "predicate determination" concerning the true nature of his Rule 60(b) motion that this Court may somehow review, independent of the judgment itself. In the first place, it was the district court's transfer order, not the Sixth Circuit, which made the "predicate determination" characterizing petitioner's motion as one for leave to file a second habeas application. And, as previously demonstrated, the court of appeals lacked jurisdiction to consider petitioner's attempted appeal of the transfer order. While the court of appeals did endorse the district court's characterization of petitioner's Rule 60(b) motion (J.A. 36), the fact remains that the court of appeals could only have accepted and decided the case on the terms of the transfer—as a motion for leave to file a second or successive application.

Finally, even if the judgment below decided more than what was transferred from the district court and encompassed, in addition, an independent adjudication by the court of appeals concerning the true nature of the motion filed by petitioner in the district court, that adjudication could only have been made in the exercise of the Sixth Circuit's original, exclusive "gatekeeping" jurisdiction under the provisions of 28 U.S.C. § 2244(b)(3), as much so as when it ultimately denied the motion. The decision whether a petitioner is in fact seeking to file a second or successive application subject to the restrictions of §2244(b) cannot logically be separated from the decision whether to grant him leave to do so, and the provisions of §2244(b)(3)(E) expressly forbid review of such decisions by certiorari. In *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-2

(1998), this Court observed that, if the court of appeals there "had granted respondent leave to file a second or successive application [rather than deciding that the statutory restrictions did not apply], then [this Court] would be without jurisdiction to consider petitioner's petition and would have to dismiss the writ." So too here, where the court of appeals has decided that the restrictions of §2244(b) do apply and has denied leave to file a second or successive application, this Court lacks jurisdiction to review the decision and should dismiss the writ.

CONCLUSION

For the reasons set forth here, the writ of certiorari should be dismissed for lack of jurisdiction; alternatively, for the reasons set forth in respondent's merits brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded, electronically and by first-class mail, postage prepaid, to Thomas C. Goldstein, Goldstein & Howe, P.C., 4607 Ashbury Pl., NW, Washington, D.C., 20016; and by facsimile and by first-class mail, postage prepaid, to Bradley A. MacLean, Stites & Harbison PLLC, SunTrust Center, Suite 1800, 424 Church Street, Nashville, Tennessee, 37219-2376; and to William P. Redick, Jr., 810 Broadway, Suite 201, Nashville, Tennessee, 37203, on this the 31st day of October, 2002.

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